

KANSAS WORKERS COMPENSATION FUND

HISTORY, PROCEDURES AND
PRACTICE TIPS

SEPTEMBER 29, 2021

HISTORY OF WORKERS COMPENSATION IN AMERICA

- Workers compensation concepts began in American in the late 19th century.
- State workers compensation laws developed as a compromise between labor and industry.
- Workers' compensation is exclusive remedy for workers who are injured on the job.

DEVELOPMENT OF WORKERS COMPENSATION IN KANSAS

- Kansas first passed an elective workers compensation law in 1911.
- 1911 law challenged on constitutional grounds in *Shade v. Cement Company*, 93 Kan. 257, 144 P. 249 (1914). Kansas Supreme Court ruled law was constitutional because it was elective.
- Kansas legislature made major changes to workers compensation law in 1974:
 - Workers compensation coverage became mandatory for most employers in 1974.
 - Self-employed persons and employers who engage in agricultural pursuits are exempt.
- *Practice Tip*: Exempt employers can elect to be covered by purchasing insurance and filing applicable election forms with the Kansas Department of Labor – Division of Workers Compensation.

KANSAS WORKERS COMPENSATION FUND

- Kansas Workers Compensation Fund created by Kansas legislature in 1974 as part of the Kansas Workers Compensation Act, K.S.A. 44-501 *et seq.*
- The Kansas Insurance Commissioner is responsible for administering the Kansas Workers Compensation Fund.
- Primary funding source for Fund is assessment levied against insurance carriers, group funded workers compensation pools, and self-insurers. (K.S.A. 2020 Supp. 44-566a(b)).
- Initial purpose of the Fund:
 - (1) encourage employers to hire or retain handicapped workers; and
 - (2) provide workers compensation benefits to injured workers where employer fails to provide required workers compensation benefits, and employer is either insolvent or unable to pay.

KANSAS WORKERS COMPENSATION FUND LIABILITY FOR “BUT FOR” CLAIMS (For injuries occurring prior to July 1, 1994)

- For work injuries prior to July 1, 1994, the Fund was obligated to pay if the work injury would not have occurred “but for” the pre-existing impairment of an employee if employer had sufficient knowledge of the employee’s pre-existing handicap.
- 1993 Kansas legislature ended Fund liability for “but for” cases for claims arising after July 1, 1994.
- Title I of the federal Americans with Disabilities Act (ADA) became effective in 1994 for employers with 15 or more employees.
- An argument for ending Fund “but for” liability was that ADA required employers to provide reasonable accommodation to handicapped or disabled workers.

KANSAS WORKERS COMPENSATION FUND

“CONTRIBUTION” LIABILITY

- Prior to the Kansas legislature enacting “sunset” legislation in 1993 to end “but for” liability cases, the Kansas Workers Compensation Fund could also be obligated to pay in “contribution” cases.
- If evidence showed that a handicapped employee’s preexisting impairment contributed to the work injury or disability, then the Kansas Workers Compensation Fund could be held liable for a portion of the compensation benefits awarded.
- 1993 Kansas legislature ended the Fund’s liability in both “but for” and “contribution” cases. This aspect of the Workers Compensation Fund was eliminated effective July 1, 1994
- Note: Some Fund “but for” and “contribution” cases remain in post Award status. These cases typically involve disputes over post Award medical treatment.

UNINSURED OR INSOLVENT EMPLOYER CLAIMS K.S.A. 2020 SUPP. 44-532a

- An injured worker of an uninsured employer can receive workers compensation benefits from the Fund under K.S.A. 2020 Supp. 44-532a.
- If an employer has no insurance coverage and is financially unable to pay required workers compensation benefits to an injured worker or if the employer cannot be located and required to pay, then the Fund can be ordered to pay the claim under K.S.A. 2020 Supp. 44-532a.
- *Practice Tip:* Workers' compensation claims that involve uninsured or insolvent employers for work injuries occurring after July 1, 1994, are cases that require the Fund to be timely implead as a party to defend the claim. Written notice to the Kansas Commission of Insurance as administrator of the Fund is required. The written notice should state the basis for Fund liability.

IMPLEADING THE KANSAS WORKERS COMPENSATION FUND AS A PARTY TO A WORKERS COMPENSATION CASE

- Fund must be implead as a party to a workers compensation case, as provided in K.S.A 2020 Supp. 44-566a(c)(1), if it may be responsible for reimbursing benefits.
- Fund Impleading Procedure:
 - Docketed claim: File Notice Impleading the Kansas Workers Compensation Fund with the Kansas Department of Labor - Division of Workers Compensation through the OSCAR electronic filing system and serve written notice on Commissioner of Insurance setting forth legal basis for Fund liability.
 - Undocketed claim: Serve written notice impleading the Fund on the Commissioner of Insurance setting forth legal basis for Fund liability.

**Commissioner of Insurance
Kansas Insurance Department
1300 SW Arrowhead Road
Topeka, Kansas 66604**

- Claim is assigned out to a Fund attorney for defense once written notice impleading the Fund is received by Commissioner of Insurance.

FUND REIMBURSEMENT

K.S.A. 2020 SUPP. 44-534a(b) (WHERE COMPENSATION IS OVERPAID OR CLAIM DENIED)

- K.S.A. 2020 Supp. 44-534a(b) applies when an employer, its workers compensation insurance carrier or self-insurer has either voluntarily or pursuant to a preliminary hearing order paid out workers compensation benefits to a Claimant, but the claim is later denied, or the payments made were more than what Claimant was otherwise entitled to receive by final Award.
- Overpayment amount is determined by the Director and then certified to the Commissioner of Insurance for payment as Fund administrator.
- Requests for payment under K.S.A. 2020 Supp. 44-534a(b) must be made within one year of the date of final Award.
- *Practice Tip:* Fund reimbursement of workers compensation benefits paid where claim is subsequently denied or dismissed may be different from a case where multiple employers seek to recover from each other paid workers compensation benefits due and owing to injured worker. See: Travelers vs. Karns & One Beacon America Insurance Company & Fund, Ks. Ct. Appeals 2021 WL 4217506, No. 121,344, opinion filed September 17, 2021, dismissing appeal.

FUND REIMBURSEMENTS UNDER K.S.A. 2020 SUPP. 44-556(d) & (e)

(AWARD OVERTURNED OR
REDUCED ON APPEAL)

- Under K.S.A. 2020 Supp. 44-556(d)&(e), the Fund can be required to reimburse employers or their insurance carrier for workers compensation benefits paid to an injured worker if the final Award is subsequently overturned or reduced on appeal.
- Reimbursement amount is to be certified by the Director for payment by Fund the same as with reimbursement claims under K.S.A. 44-534(a)(b).

FUND SUBROGATION (PURSUANT TO K.S.A 44-504(a))

- K.S.A. 44-504(a) gives the Fund right of subrogation against certain third parties if the work injury or death was caused by their negligence.
- K.S.A. 2020 Supp. 44-532a(b) also gives the Fund a cause of action against an uninsured or insolvent employer for recovery of any workers compensation benefits paid out to an injured worker of the uninsured or insolvent employer.

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